A DISCUSSION OF STATUTES AND CASES RELATING TO PREMIUM NOTICES

A paper read before the Association of Life Insurance Counsel, December 2d, 1919, by Andrew J. Davis, General Solicitor of the Provident Life and Trust Company of Philadelphia, Pennsylvania

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Doubtless all of us have at some time given consideration to the statutory requirements of the States of New York, North Carolina, Louisiana, Ohio and Kansas, in regard to premium notices. I had occasion a short time ago to look into the question of statutory premium notices, and upon receipt of the mandate from our President to read a paper at this meeting, I decided, after considerable hesitation, to prepare this paper. Apparently the first act requiring the companies to send premium notices and prescribing the form of such notices was the New York Act of May 15, 1876, contained in Chap. 341 of the Laws of New York for that year. Most of the subsequent legislation on the subject has also been enacted by New York and most of the cases have arisen under the New York acts, so I have thought it best to begin with the original New York act and refer briefly to the changes which were made by subsequent legislation.

Chapter 341 of the Laws of New York for 1876 reads in part as follows:

> "Section 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, at his or her last known post-office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

"§ 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured, provided for in section one, has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notice having been duly given."

The Act of 1876 was shortly followed by the Act of 1877, which is contained in Chap. 321 of the Acts of New York for that year. The principal changes made by the 1877 Act were the inclusion of provisions

(a) For an overdue notice;
(b) For a period of thirty days after notice in which premium could be paid;
(c) That notice must state person to whom premium is payable;
(d) That notice must be sent to assignee;
(e) That notice must state that unless premium is paid within thirty days policy will be forfeited;
(f) That company may, as an alternative to sending overdue notice, send a similar notice at least thirty and not more than sixty days prior to premium due date.

In 1892 the Act of 1877 was replaced by §92 of Chap. 690 of the Acts of 1892, and in this Act a provision for an overdue notice which had been contained in the former law was omitted, and the time for sending advance notices was changed to at least fifteen and not more than forty-five days prior to premium due date. This Act also exempted from its provisions policies on monthly or weekly payment plan and term contracts for one year or less, and prescribed certain additional facts that must be stated in the notice.

The 1897 Act, which is contained in §2 of Chap. 218 of the Laws for that year, made several changes in the law as set forth in §92 of Chap. 690 of the Acts of 1892. The 1892 Act provided that no policy could be forfeited or lapsed, without any limit as to time, unless the terms of the statute had been complied with. The 1897 Act provided that unless the statute had been fully complied with no policy could be forfeited or lapsed within one year after the default in payment of any premium. This latter Act also provided for sending notice to insured at his last known address "in this state," and limited the time within which action must be brought to one year from the date upon which default was made in paying the premium for which it is claimed that

forfeiture ensued. This limitation as to time in which action must be brought was subsequently changed by §29 of Chap. 326 of the Acts of 1906 from one year to two years.

Section 92 of Chap. 690 of the Acts of 1892, as amended by Acts of 1897 and 1906, was re-enacted, with slight changes in wording, as §92 of Chap. 33 of the Acts of 1909.

In §1 of Chap 130 of the Acts of 1918 a provision was added requiring notice in case of a policy of group insurance to be sent to the employer. The Act as amended in 1918 is as follows:

> "No life insurance corporation doing business in this state shall within one year after the default in payment of any premium, installment or interest declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of nonpayment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, or, in the case of a policy of group insurance, to the employer, at his last known post-office address in this state, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed,

until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

Under some of the earlier decisions, including Mutual L. Ins. Co. v. Dingley, decided by the United States Circuit Court of Appeals for the Ninth Circuit, 100 Fed. Rep. 408, 49 L. R. A. 132, it was held that the statute applied to contracts made by a New York corporation in a foreign State. This doctrine has since been repudiated by decisions of the United States Supreme Court and a number of State Courts. See Mutual L. Ins. Co. v. Cohen, 179 U. S. 262; Grevenig v. Washington L. Ins. Co., 112 La. 879, 36 So. 790, 104 A. S. R. 474; McElroy v. Metropolitan L. Ins. Co., 84 Neb. 866, 122 N. W. 27, 19 Ann. Cas. 28, 23 L. R. A. (N. S.) 968; Metropolitan L. Ins. Co. v. Bradley, 98 Tex. 230, 82 S. W. 1031, 68 L. R. A. 509. In Mutual L. Ins. Co. v. Cohen, Mr. Justice Brewer, in delivering the opinion of the Court, said:

"The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the state. Proceeding on the accepted principle that a state may determine the conditions, the meaning, and limitations of contracts executed within its borders, the language of the statute reaches contracts made within the state. Undoubtedly a foreign insurance company making a contract within the state of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another state would be free from its limitations. There is no indication of an intent on the part of the legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the state and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a

foreign company doing business within the state shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the state and elsewhere shall as to all its business be so limited."

As above mentioned the statute was amended in 1897 by the addition of the words "in this state," so that since that time the statute has provided that the notice shall be mailed to the insured "at his or her last known post-office address *in this state*." It has been held that the statute as thus amended is not applicable to persons not having a post-office address in the State of New York. See Metropolitan L. Ins. Co. v. Bradley, 82 S. W. 1031, 68 L. R. A. 509; and Napier v. Bankers' L. Ins. Co. of City of New York, 51 Misc. Rep. 283 (N. Y.).

The statute has been held to apply to policies issued prior to its passage but renewed by payment of premiums thereafter, the payment of each premium constituting a renewal within the meaning of the word "renewed" as used in the Act. See Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15; and Rowe v. Brooklyn L. Ins. Co., 11 N. Y. App. Div. 532, affirmed in 162 N. Y. 604.

The burden is on the company to show that notice was sent, and if notice was not sent the liability of the company is fixed by death of insured and it is not necessary for the plaintiff to pay or tender payment of premium due and unpaid before bringing suit, the unpaid premium being simply a claim to be deducted by the company from the sum due under the policy. Baxter v. Brooklyn L. Ins. Co., 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293; Fischer v. Metropolitan L. Ins. Co., 37 App. Div. 575; Howell v. Hancock Mut. L. Ins. Co., 107 App. Div. 201.

In delivering the opinion of the New York Court of Appeals in the case of Baxter v. Brooklyn L. Ins. Co., O'Brien, J., states in part:

> "The Statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. In the absence of proof on the part of the defendant as to the service of the notice, this allegation of the complaint [that the insured had paid the premiums according to the terms of the policy] was sufficiently established within the mean-

ing of the contract as evidenced by the policy and statute when read together. Before the defendant could raise any question in regard to the nonpayment of the August premium it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default or to raise any point based on his omission to pay the last quarterly premium. It must therefore be assumed, in the absence of such notice, that the policy in question was in full force at the death of the insured; and even if the payment of the last premium was omitted, the obligation and promise of the defendant to pay upon death, during the life of the policy, was unimpaired. . . . It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay, or tender, before action brought, the premium that was payable on the 24th day of August prior to the death of the insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant notwithstanding the omission to make that payment. . . . The death of the assured created a relation of debtor and creditor between the defendant and his widow, and the unpaid premium, with interest from the date when payable, was a claim to be deducted by the defendant from the sum due upon the policy."

The notice required by the statute cannot be waived by the terms of the policy. The statute is mandatory and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured or by both together. Equitable L. Assur. Soc. v. Nixon (C. C. A.) 81 Fed. Rep. 796; Equitable L. Assur. Soc. v. Trimble, (C. C. A.) 83 Fed Rep. 85; Griffith v. New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113; Osborne v. Home L. Ins. Co., 123 Cal. 610.

Where, however, the policy is not subject to the statute except by the special terms of the policy, the requirements of the statute may be waived by agreement. Mutual L. Ins. Co. v. Hill, 193 U. S. 551; and Mutual Reserve Fund L. Ass'n v. Minehart, 72 Ark. 630. There is, however, some authority to the contrary. See New York L. Ins. Co. v. English, 95 Tex. 391; New York L. Ins. Co. v. Orlopp, 25 Tex. Civ. App. 284; in which cases the statute was made applicable to the policies by agreement of the parties, and it was held that the requirement of the statute as to notice cannot be waived.

The statute does not impose upon the company the burden of showing that the insured has received the notice. All that is required from the company is to show that a notice, duly stamped and properly addressed, was deposited in the post-office, and such deposit will operate as full notice to the insured of its contents, whether he ever received it or not. New York L. Ins. Co. v. Scott, 23 Tex. Civ. App. 541; 57 S. W. 677.

The statute requires that the notice shall be sent to the insured at his last known post-office address. This provision of the statute is not complied with where the notice is sent to another person for delivery to the insured. Carter v. Brooklyn L. Ins. Co., 110 N. Y. 15.

If the company has received notice of the insured's change of address, the burden is on the company to see that notice is sent to the insured at his last known post-office address, and a notice sent to a former address which does not reach the insured will not suffice to establish a forfeiture. Goodwin v. Providence Sav. L. Assur. Soc., 97 Ia. 266; 66 N. W. 157; 59 A. S. R. 411; 32 L. R. A. 473.

If the proper notice is duly sent by the company to the insured it is not necessary that the company should also send a notice to the beneficiary named in the policy where the policy has been taken out by the insured. Osborne v. Home L. Ins. Co., 123 Cal. 610. Where, however, the policy has been taken out by the wife, who is the beneficiary, and the company knows that the insured and his wife are separated and that a suit for divorce is pending, a notice to the husband is not sufficient notice to the wife. Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156; 5 N. E. 417; 58 Am. Rep. 806.

Where the company has due notice of the assignment of a policy issued by it, the mailing of the statutory notice to the insured only is insufficient to protect the assignee's interest in the policy, and the company cannot forfeit the policy if the premium is not paid. Davis v. Northwestern Mut. L. Ins. Co., 98 Misc. 456 (N. Y.); Strauss v. Union Central L. Ins. Co., 170 N. Y. 349.

The required notice must, of course, be sent the required number of days prior to the due date of the premium, and the day on which notice is mailed should be excluded in computing the time in which the notice must be sent. In Rosen-

planter v. Provident Saving L. Assur. Soc. [96 Fed. Rep. 721; 46 L. R. A. 473], the notice was sent on September 1st. The premium was due and payable October 1st, and it was held that notice was not sent as required, at least thirty days prior to the maturity of the premium, inasmuch as the day on which the notice was sent should be excluded, leaving only twenty-nine days between September 1st and October 1st.

It has been held that the provision in the statute that the affidavit "of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given," merely prescribes a rule of evidence and has no force outside the State of New York, and such provision will not make the affidavit admissible in an action brought in another State. Equitable L. Assur. Soc. v. Frommhold, 75 Ill. App. 43.

Although a notice in proper form is found after the death of the insured among his effects, this is not sufficient to establish the time when the notice was sent so as to justify an inference that the notice was timely. Phelan v. Northwestern Mut. L. Ins. Co., 113 N. Y. 147.

If proper form of notice is duly served prior to the due date of the premium, no further notice thereafter is required. Conway v. Phoenix Mut. L. Ins. Co., 140 N. Y. 79. If the required statutory notice has been sent prior to premium becoming due and if notes are given for a premium, the company in such case is not required by the statute to send the statutory notice prior to the due dates of the notes. Bartholomew v. Security Mut. L. Ins. Co., 140 App. Div. 88, 204 N. Y. 649; and O'Brien v. Union Central L. Ins. Co., 207 N. Y. 180, affirming 140 App. Div. 362.

The most interesting and, in many ways, the most important cases have involved not the question of whether a notice was sent in due time, but whether a notice which was admittedly sent in due time was in such form as to meet the technical requirements of the statute. The position of the Courts can be seen only by a careful study of the provisions of the notices which were sent and the reasoning of the Courts in the various cases. The early case of Phelan v.

Northwestern Mut. L. Ins. Co., 20 N. E. Rep. 827, was decided by the New York Court of Appeals, on March 26th, 1889, under the laws of 1877, Chap. 321, which provided for an overdue notice stating in part "that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void." The only notice sent by the Company was as follows:

> "Office of the Northwestern Mutual Life Insurance Company,
>
> "Milwaukee, Wis., November 1, 1882.
>
> "George F. Phelan, 37 Barclay Street: The 4 qr. premium of $17.40 on your policy No. 102,320 falls due at the office of the agent of this company in New York city, N. Y., before noon on the 31st day of December, 1882. The conditions of your policy are that payment must be made on or before the day the premium is due, and members neglecting so to pay are carrying their own risk. Agents have no right to waive forfeitures. Please present this notice at time of payment.
>
> "Yours respectfully,
>
> "J. W. Skinner, Secretary.
>
> "H. M. Munsell, Gen'l Agent, Northwestern Mutual Life Co., 160 Fulton St. Office, cor. Broadway, N. Y. City.
>
> "Prompt payment is necessary to keep your policy in force."

The Court, in commenting on the insufficiency of the notice, said:

> "We are also of opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited, and void,' conveys a meaning easily to be comprehended. To refer to the policy and its conditions, and say that 'members neglecting so to pay are carrying their own risk,' is quite another thing, and while it may be comprehensible to those versed in the language of insurers, and accustomed to their phraseology, it is not the lan-

guage of the statute, and does not embody the notice which the statute requires."

This is a clear case in which the notice did not fulfill the requirements of the statute. The words "carrying their own risk" are vague when compared with the clear, precise and indubitable words of the statute—"will become forfeited and void."

The next case which I will mention, McDougall v. Provident Sav. L. Assur. Soc. of New York, 32 N. E. 251 [1892], also decided by the Court of Appeals of New York under the 1877 Act, involved a policy issued for the term of one year, with provisions for renewal for successive years on the payment of the mortuary premium and expense charges. The notice sent by the Company stated in part: "the premium, as stated below, on your policy No. 13,302 in this society will become due and payable at this office on the 23d day of July, 1888. In order to continue and extend the insurance, it will be necessary that the payments required for that purpose shall be paid on or before the date above mentioned, as stipulated in the policy contract." The counsel for the Company argued at length that the statute did not apply to a contract of the kind under consideration, but maintained that the statute, by force of the language used, referred to the ordinary policy of insurance. The Court, in discussing this phase of the case, said:

> "We should hesitate to call in question the applicability of the statute to any class of life insurance policies. It was intended to, and undoubtedly does, subserve a useful purpose, in throwing about the contract between the insurer and the assured reasonable safeguards against a forfeiture or the lapsing of the interest of the assured."

In upholding the form of notice which was sent by the Company, the Court said:

> "This notice would seem to be very definite in its statements; but the respondents say, and the court below has thought, that it is not in conformity with the provisions of the statute, in not literally following the statutory language. . . . In this case, as the appellant's counsel has clearly shown, the notice to be given could not closely conform to the statute, inasmuch as the yearly method of insurance was of a special character. The notice was to remind the assured of the privilege he possessed of electing to have the contract continued and

extended over the ensuing year, and of the conditions of its exercise. It could not state that if the 'premium' was not paid, the policy and all payments thereon will become forfeited and void; for that would not be accurate. Something more than a premium was to be paid to extend the contract of insurance, and therefore the company notified him that certain 'payments' were necessary for that purpose. The obligation of the statute must not be unreasonably insisted upon. It provides for the giving of a notice, which shall be unambiguous, and intelligible to all. When applied to an insurance contract out of the ordinary form, it secures to the assured such a notice as will contain statements reminding him of when and where he is to make any payments pursuant to the terms of the contract, their amount and the effect of nonpayment. The statute was not meant to operate harshly upon the insurer, but to afford a protection to the assured, by the reasonable requirement of a notice, couched in plain terms, from the insurer, before the interest of the assured could be forfeited. To hold that, where every essential fact required to be known is intelligibly stated in the notice, it may be disregarded, if not literally following the words of the statutory provision, would be a most harsh and unwarrantable construction. Its words are readily capable of being used in the ordinary cases of insurance contracts, but in cases not precisely had in view, and where some regard must be had to the nature of the contract itself, it is sufficient if the essential information to be afforded by the statute is found in the notice actually given."

It is necessary to keep in mind the special form of contract in this case in order to reconcile it with some of the subsequent decisions.

In Merriman v. Association (Sup.), 18 N. Y. Supp. 305, the notice was to pay "within thirty days from the date of notice, otherwise your policy will be forfeited." This was held not to comply with the statute in that it failed to notify the assured that all payments which had been made would be forfeited and the policy would be void.

On December 2nd, 1896, the case of Schad v. Security Mut. L. Ass'n of Binghamton was decided by the Supreme Court of New York, App. Div., 3rd Dept. The notice in this case stated:

"The next regular advanced payment on your policy, No. 147, will, by its terms, become due and payable at the home office in Binghamton, N. Y., on the 28th day

of Sept., 1892. Amount 20.48. . . . If your payment should not be made when due, your policy would cease to be in force. Delayed payments are accepted only upon satisfactory evidence of continued good health. No agent or collector has authority to extend the time for the payment of a premium."

The Court, in discussing the notice, said:

"The question to be determined is whether a notice, which states that, 'if your payment should not be made when due, your policy will cease to be in force,' complies with the statute which requires that the notice shall state that, if the premium is not paid when due, 'the policy and all payments thereon will become forfeited and void.' . . . The defendant relies on the McDougall case. There the notice was held to be good because the contract of insurance was out of the ordinary form, and the obligation of the statute was construed in that view. It was said that in the ordinary cases of insurance contracts the words of the statute are readily capable of being used. Inferentially it may be said that the view of the court was that they should be used in ordinary cases. In the present case there was nothing in the way of using the language of the statute, and the McDougall case is not, I think, authority to support the notice."

This case shows the position of the Courts quite clearly, which is that when on account of the particular terms of the policy the exact words of the statute cannot be used, they will permit the company to use any form of notice which substantially complies with the requirements of the Act; but where there is nothing to prevent the Company from using the exact wording of the statute, the company departs from the wording at its peril, and the Courts will strictly construe against the company the wording substituted by the company, and unless it is clearly as significant and unequivocal as the language of the statute, it will not be upheld.

Nederland L. Ins. Co. v. Meinert, 199 U. S. 171, decided by the United States Supreme Court on November 6, 1905, was before the Court on a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a judgment which affirmed a judgment of the Circuit Court of the District of Indiana, in favor of the plaintiff. The Company sent a notice which, after giving the name and address of the Company, provided:

"Pursuant to chapter 690 of the insurance law of 1892 of the state of New York, you are hereby notified that the quarterly premium of $25.25 on policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. The conditions of your policy provide that unless such premium shall be paid at the United States branch office of the company, or to a person authorized to collect such premium, holding the company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy."

Mr. Justice Peckham, in delivering the opinion of the Court, said in part:

"The alleged failure to comply with the terms of the section consists in prefixing the words '*the conditions of your policy provide,*' to the notice required by the statute, which provides that the notice shall state that 'unless such premium . . . then due shall be paid . . . by or before the day it falls due' (March 5, 1897), 'the policy and all payments thereon will become forfeited and void,' etc., whereas, by reference to the policy, article 2, indorsed on the back thereof, it will be seen that if the premium is not paid *within thirty days* after the same shall fall due, the policy shall be null and void. The notice thus mistakenly states that the policy 'by its conditions' will become void, etc., while in truth it is the language of the statute which the notice uses. . . . Referring to the statute, it is seen that, by omitting the above-mentioned words, 'the conditions of your policy provide,' the rest of the notice actually given does comply with the terms of the statute. The notice informed the assured that, unless the premium which would fall due on the 5th of March, 1897, if the policy was then in force, should be paid by or before that date, the policy and all payments thereon would become forfeited and void, except as to the right to a cash surrender value or paid-up policy. This is exactly what the statute required the notice to state. The statute does not require the notice to state that the policy would become forfeited only after the expiration of thirty days after the payment became due, or notice was mailed, in case such payment were not made, but it says distinctly that the notice shall state that failure to pay the premium by or before the date it falls due will forfeit the policy and all payments thereon. . . . . There can be no doubt that the premium did become due on the 5th of March, and the thirty days' extension simply permitted a payment within that

time to save a forfeiture. Now, whether the statement in the notice were incorrect because of a failure to state accurately the conditions of the policy, or because of a failure to tell the assured the subsequent provisions in the statute as to forfeiture, is not in either case material, so long as the notice follows the statute; and if it do that, it is good, even though it contains such a mistake as is set forth herein. The purpose of the statute was to prevent a forfeiture by the nonpayment of the premium when due, because of inadvertence or forgetfulness; and when the assured receives the very notice required by the statute, its purpose is fulfilled, although the notice contains in another respect such a mistake as does this notice. . . . A statute of this kind should not be construed so as to make it a trap for either side. Forfeitures, though generally not regarded with favor by courts of equity, yet are necessary, and should be fairly enforced, in cases of life insurance. Promptness of payment is essential in such business."

I have quoted at length from the opinion in the above case because it is very interesting and important in showing the attitude of the Courts when the company has practically followed the wording of the Law, although the notice may not be strictly correct in that it may not contain any reference to a grace period following the due date of the premium, within which the premium can be paid to prevent forfeiture. I will consider later a little more fully the question as to the advisability of including in the notice a reference to the grace period.

The case of Schuell v. Mutual L. Ins. Co. of New York, decided by the New York Supreme Court, App. Div., 1st Dept., on July 17, 1900, arose under Chap. 218 of the Laws of 1897. You will recall that one of the amendments made in 1897 was the inclusion of a provision which limited the time within which the company could not declare a policy forfeited and void unless the notice was duly sent, to one year. This case is of interest, therefore, on account of the construction given by the Court to the aforesaid limitation period, as well as to the question involved as to the sufficiency of the notice.

The notice, which was admittedly sent in due course, besides giving as a heading the name of the company and the location of its offices, read:

"In accordance with the terms of contract No. .... with this company $..... will be due on the ..... day of ....., 189.., and payable to the cashier at this office. Unless the amount so due shall be paid to this company by or before the said day, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as provided by statute. The sending of this notice is not a waiver of any agreement contained in the said policy, or of any right of forfeiture, or of any default on the part of any owner of said contract."

The Court, in the course of its opinion, said:

" . . . it is insisted that this notice is not sufficient, because it is merely advisory as to what the policy provision is, and does not definitely fix any date. . . . We think that the objection taken to the form of the notice is hypercritical, as the notice does give the policy holder definite information as to the amount he was to pay, and the date and place where it was payable; and, in addition, it informed him, as required by statute, that, unless he paid the premium on or before the due date, the policy would become forfeited. . . . It appears that there could be no misunderstanding on the part of any intelligent person receiving it [the notice] as to the amount payable, the time and place when, under the terms of the contract, it should be paid, nor as to the fact that, if not paid at the time fixed, the policy would become forfeited. We think, therefore, that the notice was sufficient."

I submit that the notice in this case fully complied with the requirements of the statute and the contention of the plaintiff that it was insufficient was, as the Court said, hypercritical. In discussing that part of the 1897 Act which prohibits the companies from declaring a policy forfeited or lapsed within one year after default in payment of premium where the required notice has not been sent, the Court said:

"It is conceded that the notice, which we think was sufficient, was mailed to the policy holder on February 9, 1898, for the premium due March 12, 1898, so that the requirement of the statute which says that such notice is to be sent 'at least 15 days and not more than 45 days prior to the day when the same is payable' was complied with. It is also conceded that the premium was not paid as required by such notice; and the policy, therefore, became forfeited, unless by force of the statute such notice could not work a forfeiture. This latter

is the appellant's view. . . . We do not think that the statute is susceptible of any such construction. Its terms are reasonably clear, and the purpose sought was to prevent a forfeiture without notice; and in that connection it provided that unless the notice was given within the specified time before the due date of the premium, and upon failure to give any notice thereafter, the policy would not become forfeited for the period of one year, nor during that year should it become forfeited unless the statutory notice fixing the time when the premium was required to be paid was given. Where, however, the legal notice before the due date of the premium is given, there is no year of grace thereafter allowed by the statute during which the policy may be reinstated by the payment of the premium. The purpose of the statute, as clearly expressed, was to prevent a policy becoming forfeited without notice by the mere fact that the due date of the premium had arrived. The company therefore, if it intends to forfeit the policy by failure to pay the premium when due, must give notice within the times specified, and before the due date of the premium. If it allows that date to arrive without giving such notice, then the policy holder has a year thereafter within which to pay, unless the company shortens that time by giving the statutory notice requiring payment at a fixed date within the year."

Two of our own policies were involved in the next important case decided by the New York Court of Appeals. See Flint v. The Provident Life and Trust Company of Philadelphia, 109 N. E. 248 [1915]. The notice, which was sent in due course, read in part as follows:

"Please Advise Any Change of Address.

"The Provident Life and Trust Company of Philadelphia (Pa.)

"Please return this notice with remittance to William T. Ferris, General Agent, Rooms 414-417 Singer Building, 149 Broadway, corner Liberty Street.

"New York City, Dec. 14, 1911.

"Arden A. Flint, 371 Hamilton St., Albany, N. Y.,: Take notice that the premium noted below will be due on policy No. 103544 on 12 Mo. 30, 1911, if said policy be then in force, and that, if not paid, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy which may be provided in said Policy or by statute.
Premium.....$38.60....."

The opinion of the Court, delivered by Willard Bartlett, C. J., was in part as follows:

> "The notice in the present case is defective because it fails to state that the policy will become forfeited if payment of the premium is not made 'by or before the day it falls due.' It does tell when the premium is due; it also says that if the premium is not paid the policy and all payments thereon will become forfeited and void; but it does not declare that these consequences will ensue if the premium be not then paid or be not paid 'by or before' that day. In other words, the notice does not negative the possibility that a forfeiture may be avoided by paying the premium after the day when it falls due. The notice prescribed by the statute is designed to impress upon the insured the absolute necessity of paying by or before that date if he would avoid forfeiture. This feature is so essential that its absence is fatal. Unless there is something in the language of the insurance contract to render it inapplicable, the language of the statute may readily be incorporated in the notice. It is difficult to understand why insurance companies manifest so much reluctance to use it."

The decision which was reached, although somewhat technical, would appear to be consistent with the holdings of the Court in former cases, in that the notice did not include either the words "by or before the day it falls due" or their equivalent.

On April 17, 1917, the New York Court of Appeals handed down its decision in the case of McCormack v. Security Mut. L. Ins. Co., 116 N. E. 74. The notice in this case made a distinct reference to the grace period, reading in part as follows:

> "Unless said premium shall be paid on or before said date, the policy and all payments made thereon will become forfeited and void, except that this notice shall not affect any right to paid-up or extended insurance, or to 30 days' grace, if provided for in the policy contract."

The Court, in the course of its opinion, said:

> "This statement [the above quoted part of the notice] has been criticised in two particulars. It is said that the reference to 30 days' grace introduces an element of uncertainty. We think the criticism is answered by Nederland Life Ins. Co., Ltd., v. Meinert, 199 U. S. 171, 26 Sup. Ct. 15, 50 L. Ed. 139, 4 Ann. Cas. 480. There was a period of grace which made it proper to

adapt the language of the statute to the peculiar provisions of this policy. What form of words would best attain that end was, of necessity, to be determined by the insurer, and in doing that it had a reasonable range of choice. McDougall v. Provident S. L. A. Soc'y, 135 N. Y. 551, 556, 32 N. E. 251; Flint v Provident L. & T. Co., 215 N. Y. 254, 258, 109 N. E. 248. The choice which it made involves no sacrifice of substance. There is a suggestion, however, of still another departure from the statute. The statute speaks of a notice that the policy and all payments made thereon will become forfeited and void 'except as to the right to a surrender value or paid-up policy as in this chapter provided.' The notice says that the policy and all payments made thereon will become forfeited and void 'except that this notice shall not affect any right to paid-up or extended insurance.' We are told that there should have been some mention, not only of the paid-up or extended insurance, but also of a surrender value. To this criticism there are two answers. In the first place, the purpose of the notice is to spur the assured to diligence. An omission to mention the privileges that remain exempt from forfeiture can only strengthen the stimulus. We cannot say with reason that a statement of such exceptions is of the substance of the notice."

In Thompson v. Postal L. Ins. Co., 165 N. Y. Supp. 500, decided by the Supreme Court of New York, App. Div., 1st Dept., June 8, 1917, it was held that failure to mention the right to a paid-up policy in the notice did not make the notice invalid where the right to a paid-up policy did not exist under the terms of the policy contract.

The notice in McDonald v. Aetna L. Ins. Co., 169 N. Y. Supp. 762, decided by the Supreme Court, App. Div., 1st Dept., March 22, 1918, was in the form of a card, the notice stating on the front that the premium "will become due on the 2nd day of April, 1916," and on the reverse side of the card there was printed "Thirty-one days' grace are allowed in the payment of premiums, but interest at 6% is charged for the time deferred, and practically it is better to pay promptly when due." The holding of the Court was in part:

"It is contended by the appellant that this is a substantial notification that there would be forfeiture unless the payment was made on or before the 2nd day of April, 1916, which was the due date. This, however, is nega-

tived by the fact that under the terms of the policy it could not be forfeited for the failure to pay on the due date, but could only be forfeited for failure to pay within 31 days thereafter, together with interest on the overdue payment at 6%. It is further negatived by the advice that 'practically it is better to pay promptly when due.' Taking the notice as a whole, it is quite possible and reasonable to infer that the notification was that the policy would be forfeited unless payment was made within 31 days after the due date; but in any event the law does not permit forfeiture upon notices that are not plain and clear and that do not substantially comply with the statute. Within the reasoning and authority of the Flint case, this notice is fatally defective."

This case is not contrary to nor does it lessen the authority of the McCormack case. The notice was bad, not because it made a reference to the grace period, but because it was so loosely worded and did not set forth a clear, distinct warning within the spirit of the statute.

After we have considered the foregoing cases, it seems to me one of the most interesting questions to present itself to us is whether or not the notice should contain a reference to the grace period. There is no uniformity among the companies in this regard. Some mention grace in their notices and others do not. In New York L. Ins. Co. v. Dingley, 93 Fed. 153, the notice read in part:

> "Unless such premium then due shall be paid to the company, or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, such policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value or paid-up policy which may be provided in said policy, or by statute."

This notice followed almost the exact wording of the statute, but the Court took the view that the notice was bad because it failed to make a proper reference to the grace period and therefore misled the insured as to the time within which the premium must be paid. The reasoning of the Court is very interesting, although exceedingly hard to follow. It is in part as follows:

> ". . . after reminding him that the premium became due and payable July 19, 1896, and informing him, wrongly, that, if it was not then paid, the policy, and all payments thereon, would become forfeited and void, it

[the notice] proceeded to say that such notice was given because of the statute of New York, and that it did not 'modify any of the terms of the contract'; one of the provisions of which, it reminded the insured, was that: [here the Court recited the grace provisions of the policy]. These contradictory and inconsistent notices do not answer the requirement of the New York statute, as construed by the court of appeals of that state, which demands a notice to the insured in plain, and therefore unambiguous, terms, of the time when the premium will be due, and of the time when a forfeiture will accrue if not theretofore paid. The insured, in the present instance, receiving the notice sent him by the company, and from lack of ability, or neglect, not having paid the premium on the 19th day of July, 1896, might very readily have supposed that his failure to pay on that day worked a forfeiture of the policy; for in the first part of the notice he was distinctly so told, although wrongly, as has been shown. Receiving such notice from the company, and the 19th day of July, 1896, having come and gone without the payment of the premium, it might very well have happened that the insured relied upon the information thus conveyed, and abandoned all effort to pay the premium, without looking to the statute of New York, or to the grace clause printed on the back of the notice, to which his attention was also directed in the notice, by one of which provisions he was still allowed 8 days, and by the other 30 days, after July 19, 1896, within which to pay the premium, and avoid the forfeiture of his policy."

Judgment for plaintiff was affirmed. This case was subsequently reversed by the United States Supreme Court, on the ground that the statute did not apply to the policy at issue, and in the Nederland case, supra, the United States Supreme Court said: "We are aware of the case of N. Y. L. Ins. Co. v. Dingley, 34 C. C. A. 245, 93 Fed. 153, but we cannot agree with the views therein expressed."

The Courts in the Nederland, McDougall and Flint cases recognized the right of the companies to depart from the wording of the statute in cases where the terms of the policy in regard to forfeiture &c., were not in keeping with the wording of the statute. In the McCormack case, the notice contained a reference to the grace period, and the Court said: "There was a period of grace which made it proper to adapt the language of the statute to the peculiar provisions of this policy. What form of words would best attain that end, was,

of necessity, to be determined by the insurer and in doing that it had a reasonable range of choice."

I think we have seen from a study of the cases that the Courts have taken the position that the statute was intended to spur the insured to action by informing him that unless he paid a certain premium by or before a certain day his policy would be forfeited. We must, therefore, keep this in mind in inserting in the notice a provision as to grace. If the policy is entitled to grace and the language of the statute is strictly followed and no reference is made to grace, the information given to the insured is clearly inaccurate. It would appear, therefore, that the wording of the statute could, under the McCormack and other cases, safely be altered so as to state the conditions accurately, using, for example, such wording as "by or before the day it falls due or within the grace period of thirty-one days thereafter." If no mention is made of the grace, it is possible, theoretically at least, as maintained by the Court in the Dingley case, supra, that the notice may, in some cases, do more harm than good, in that the insured may not be able to pay the premium when due but could pay the premium within the grace period, but either never knew of the grace period or was lulled to sleep in regard thereto by the absolute wording of the notice.

On the other hand, however, the Courts have criticised the companies for not following the wording of the statute where the terms of the policy permit, and when the words of the statute have been employed the notice has been held good even although it is not in accordance with the terms of the policy. In the Nederland case the Court said: "Now, whether the statement in the notice were incorrect because of a failure to state accurately the conditions of the policy, or because of a failure to tell the assured the subsequent provisions in the statute as to forfeiture, is not in either case material so long as the notice follows the statute." In the end, the question as to whether a reference should be made to grace is one which counsel of each of the companies must decide, although I think we will agree it would be helpful to have more uniformity of action in this regard.

Louisiana

The Louisiana Act is, with a few slight changes, practically a re-enactment of the New York Act of 1906. I will not dis-

cuss this Act, but merely include it in the interest of completeness.

"Prohibiting Forfeiture of Policies.
"Act No. 68 of 1906.
"AN ACT

"Prohibiting life insurance companies from forfeiting policies for default in payment of premiums, interest or installment, unless written or printed notice has been mailed to the policy holder or the assignee of the policy.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That no life insurance corporation, etc., doing business in this State shall within one year after the default in payment of any premium, installment or interest declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid within one year from the failure to pay such premium, interest or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to surrender value, extended insurance, or paid-up policy. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited, or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

North Carolina

Like the Louisiana Act, the North Carolina Act of 1909 is also, with a few slight changes, practically a re-enactment of the New York Law of 1906. The North Carolina Act is as follows:

"An Act to Prevent the Forfeiture of a Life Policy Without Notice.
"[Chapter 884, Laws 1909.]

"Section 1. No life insurance corporation doing business in this state shall, within one year after the default in payment of any premium,

installment or interest, declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it shall be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation at his or her last known post-office address in this State, postage paid by the corporation or by any officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment, or portion thereof then due shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as in the contract provided. If the payment demanded by such notice shall be made within its time limit therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such poilcy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy unless the same is instituted within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued."

Ohio

The Ohio Statute is quite different from the laws of the other states. It is contained in Sec. 9371, p. 37 of the 1918 Edition of Insurance Laws of Ohio, and reads as follows:

> "Any such company issuing policies on tontine or semi-tontine plan, or which claims to be mutual as to its profits to residents of this state, after the payment of the first premium thereon, and not more than sixty days and not less than ten days prior to the maturity of each and every premium, thereafter in writing shall notify every such policyholder, namely the person whose life is insured or the assignee of such policy, if the company has been notified of its assignment, and the address of the assignee given residing in this state, of the time of payment of such premium. Proof of the depositing of the notice to the policyholder or assignee in the postoffice by the company or its agent, postage prepaid to the last address as given by policyholder or assignee to the company,

shall be conclusive proof of its service. Such notice shall set forth fully the amount of the dividend belonging to the policy, when requested by the policyholder if it be a participating policy, and at the end of the tontine or semi-tontine period of each policy, the company issuing it shall make a statement to the policyholder of all the dividends and profits accruing thereon, and from what sources they have been derived. (R. S. Sec. 3608.)"

I do not know of any cases interpreting the meaning of that part of the Act reading "shall notify every such policyholder, namely the person whose life is insured, or the assignee of such policy." In the long line of cases the word "or" as used in the New York statute has been interpreted to have been used by the legislature in a conjunctive and not disjunctive sense, and equivalent to the word "and." It is possible that a similar interpretation might be given to the word "or" in the Ohio statute. It would appear to be better practice, therefore, in Ohio, to send a notice to the assignee as well as to the insured.

Kansas

The Kansas statute is unlike the statutes of the other states, and as it has been interpreted by the Supreme Court of the State of Kansas, places an undue burden upon the companies. The Act was passed on March 17th, 1913, and some of the companies have already suffered on account of its provisions. This statute provides in part as follows:

"Section 1. It shall be unlawful for any life insurance company other than fraternal doing business in the state of Kansas to forfeit or cancel any life insurance policy on account of the non-payment of any premium thereon, without first giving notice in writing to the holder of any such policy of its intention to forfeit or cancel the same.

"Sec. 2. Before any such cancellation or forfeiture can be made for the non-payment of any such premium the insurance company shall notify the holder of any such policy that the premium thereon, stating the amount thereof, is due and unpaid, and of its intention to forfeit or cancel the same, and such policy holder shall have the right, at any time within thirty days after such notice has been duly deposited in the post office, postage prepaid, and addressed to such policy holder to the address last known by such company, in which to pay such premium; and any attempt on the part of such insurance company to cancel or forfeit any such policy without the notice herein provided for shall be null and void. The affidavit of any

responsible officer, clerk or agent of the corporation, authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be *prima facie* evidence that such notice has been duly given."

The statutes of New York, Louisiana, North Carolina and Ohio require the companies to send notice to the insured or assignee. The Kansas statute requires that the notice shall be sent to the "holder" of the policy. The word "holder" as used in the statute is subject to more than one interpretation. It may, for example, mean the insured or the assignee or even the beneficiary. Consequently the only safe course for the companies to follow would appear to be to send the notice to all persons or parties having any interest or ownership in the policy. Inasmuch as the notice has been held to be an overdue notice [Priest v. Bankers Life Ass'n, infra], the burden of sending the notice to all persons having any interest or ownership in the policy is not as great as it would be if the notice had to be sent out prior to the due date of the premium, because, of course, a majority of the premiums will be paid before the expiration of the grace period. The statute came before the Supreme Court of Kansas in Priest v. Bankers Life Ass'n, 161 Pac. 631. The notice in this case was mailed on June 23, 1914. The premium was due July 1, 1914. There was a one month's grace period, so that payment could be made on or before August 1, 1914. The facts are somewhat involved by the question of reinstatement. In reference to the sufficiency of the notice, the opinion reads in part as follows:

"The Court regards the statute as providing for notice of an intention to forfeit under an accrued right to forfeit, and not for notice given before the time for payment has expired that forfeiture will be enforced if payment be not made. The notice of June 23d did not and could not state that the assessment which was not due until July 1st, and which could be paid as late as August 1st, was both due and unpaid, as the statute requires. . . . The notice which the defendant gave was notice of an assessment, which called attention to the penalty for non-payment. The statute of Kansas does not recognize it as a notice of intention to forfeit, and without statutory authority it cannot be substituted for a forfeiture notice to be given after default . . . the notice required is not notice of a contingent intention to forfeit which may possibly be entertained in the future. It is notice of an actual

intention to forfeit because premium has not been paid. Such an intention cannot exist until cause for forfeiture arises. Causes for forfeiture cannot arise during the time within which payment may rightfully be made. That time must expire and the premium be unpaid. In the present instance the assessment was 'due' on July 1st, but it could be paid at any time on or before August 1st without delinquency. The word 'nonpayment' in the first and second sections of the statute, and the word 'unpaid' in the second section, imply default in payment, and the statutory notice could not be given before August 2d."

It is to be hoped that the Kansas Legislature will very soon see the injustice of the present Kansas Law, and either change the form of notice required to an advance notice, or at least change the provisions of the statute so that if an overdue notice is required, it can be sent when the premium is due, so that the thirty days' time given by the statute can be running simultaneously with the grace period allowed by the policy. The effect of the present statute is to force the companies to allow Kansas policyholders a grace period of two months, whereas the policyholders of other states are allowed only a grace period of thirty or thirty-one days.